

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 182

Docket No. DE-1221-09-0158-W-1

**Barry D. Inman,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

September 8, 2009

Barry D. Inman, Wichita, Kansas, pro se.

Kent E. Duncan, Esquire, Saint Louis, Missouri, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that dismissed his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition, REVERSE the initial decision, and REMAND the appeal for adjudication on the merits.

BACKGROUND

¶2 The appellant timely filed an IRA appeal seeking reversal of the agency's action laterally reassigning him from the GS-13 position of Assistant Veteran Service Center Manager to the GS-13 position of Decision Review Officer. Initial Appeal File (IAF), Tab 1.

¶3 Based on the written record developed by the parties, the administrative judge found that the appellant established that he had exhausted procedures before the Office of Special Counsel (OSC) and that he had made a nonfrivolous allegation that he engaged in whistleblowing by showing that he disclosed to his second-level supervisor his allegation that his immediate supervisors at the time that he made the disclosures, managers Daniel Umlauf and Michael Walcoff, abused their discretion by manipulating the hiring process for the Veteran Service Center Manager position. IAF, Tab 12 (Initial Decision (ID)) at 2-3. To find that the appellant nonfrivolously alleged that he made a protected disclosure in this appeal, the administrative judge relied on his finding in an earlier appeal filed by the appellant in which the administrative judge found that the appellant's disclosure of his supervisors' alleged abuse of discretion constituted a nonfrivolous allegation of a protected disclosure. ID at 2. However, the administrative judge found that the appellant failed to nonfrivolously allege that his protected disclosure was a contributing factor to his reassignment. ID at 3-6.

¶4 In finding that the appellant failed to make a nonfrivolous allegation that his protected disclosure was a contributing factor to his reassignment, the administrative judge relied on the following: the agency reassigned the appellant approximately 15 months after his first protected disclosure; the appellant presented no evidence to support his assertion that Umlauf and Walcott, who were no longer the appellant's supervisors at the time of the reassignment, were involved in the decision to laterally reassign him; the appellant's supervisor at the time of the reassignment, Karl Pfanzelter, testified at the hearing held in an earlier IRA appeal filed by the appellant regarding his nonselection for the Veteran Service Center Manager position that Pfanzelter reassigned the appellant based solely on the recommendation of an Administrative Investigation Board (AIB), which was convened to review alleged misconduct by the appellant; and Pfanzelter avers in his affidavit that he made the decision to reassign the

appellant without input from Umlauf and Walcott, and Umlauf and Walcott aver that they played no role in the decision to reassign the appellant. ID at 3-5.

¶5 The appellant petitions for review. Petition for Review File (RF), Tab 1. The agency has responded in opposition to the petition. RF, Tab 4.

ANALYSIS

¶6 An agency may not take or fail to take a “personnel action,” as that term is defined in [5 U.S.C. § 2302\(a\)\(2\)\(A\)](#), in reprisal for an employee's disclosure of information protected under [5 U.S.C. § 2302\(b\)\(8\)](#). An employee who believes his agency has violated this prohibition may file an IRA appeal after seeking corrective action from OSC. [5 C.F.R. § 1209.5\(a\)](#). The Board has jurisdiction over such an appeal if the appellant has exhausted his administrative remedies before OSC and has made nonfrivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure; and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, [242 F.3d 1367](#), 1371 (Fed. Cir. 2001). To meet the nonfrivolous standard, an appellant need only plead allegations of fact which, if proven, could show that he made a protected disclosure and that the disclosure was a contributing factor. *See Simone v. Department of the Treasury*, [105 M.S.P.R. 120](#), ¶ 8 (2007).

¶7 Whether allegations are nonfrivolous is determined on the basis of the written record. *Spencer v. Department of the Navy*, [327 F.3d 1354](#), 1356 (Fed. Cir. 2003); *Crenshaw v. Broadcasting Board of Governors*, [104 M.S.P.R. 475](#), ¶ 8 (2007). In determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing in an IRA appeal, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of

the parties, and the agency's evidence may not be dispositive. *Simone*, [105 M.S.P.R. 120](#), ¶ 8; *Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 329 (1994).

¶8 The record reflects that the appellant exhausted his administrative remedies before OSC. IAF, Tab 1; *see Yunus*, 242 F.3d at 1371. Further, the appellant has nonfrivolously alleged that he made a protected disclosure, alleging to his second-level supervisor that Umlauf and Walcott were abusing their discretion in the personnel process that resulted in the selection to fill the vacancy in the Veteran Service Center Manager position. IAF, Tab 4. The administrative judge properly relied on his finding in an earlier appeal filed by the appellant in which the administrative judge had found that the appellant's disclosure of his supervisors' alleged abuse of discretion constituted nonfrivolous allegation of a protected disclosure. *See Powers v. Department of the Navy*, [97 M.S.P.R. 554](#), ¶ 14 (2004). At issue here is whether the appellant nonfrivolously alleged that his whistleblowing activity was a contributing factor in the agency's decision to laterally reassign him.

¶9 In order to satisfy the contributing factor criterion, an appellant need only raise a nonfrivolous allegation that the fact of, or content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *Santos v. Department of Energy*, [102 M.S.P.R. 370](#), ¶ 10 (2006). To this end, Congress established a knowledge/timing test that allows an appellant to demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the whistleblowing disclosure and took the personnel action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *See 5 U.S.C. § 1221(e)(1)(A), (B)*; *Rubendall v. Department of Health & Human Services*, [101 M.S.P.R. 599](#), ¶ 12 (2006).

¶10 Here, the appellant alleged that he disclosed Umlauf's alleged abuse of authority and also asserted that Umlauf played a role in his reassignment. The

appellant alleged that Umlauf was aware of the appellant's protected disclosures. The appellant stated that, after he told his second-level supervisor of his belief that Umlauf was abusing his discretion in the personnel process, the appellant's second level supervisor discussed the appellant's complaint with Umlauf. IAF, Tab 4. Further, the appellant alleged that Umlauf, who continued to be a manager with the agency, "ordered the initiation of the [Administrative Investigative Board] in his letter directed to Phyllis Hilger dated June 30, 2008." IAF, Tab 6. We find that these allegations of fact, if proven, constitute nonfrivolous allegations that satisfy the "knowledge" prong of the knowledge/timing test. *See Swanson v. General Services Administration*, [110 M.S.P.R. 278](#), ¶ 12 (2008).

¶11 The administrative judge erred in considering the agency's submissions, specifically, the affidavits of Pfanzelter, Umlauf, and Walcott that the agency submitted into the record of this appeal in which Pfanzelter avers that he made the decision to reassign the appellant without input from Umlauf and Walcott, and Umlauf and Walcott aver that they played no role in the decision to reassign the appellant, to find that Umlauf did not play a role in the appellant's reassignment. The agency's assertion through these affidavits that Umlauf played no role in the appellant's reassignment is merely a factual contradiction of the appellant's otherwise adequate nonfrivolous allegation of fact to satisfy his jurisdictional burden under the knowledge prong of the knowledge/timing test. As noted, the Board may not weigh such evidence in order to resolve the conflicting assertions of the parties regarding jurisdiction. *See Ferdon*, 60 M.S.P.R. at 329.

¶12 Further, with respect to the "timing" prong of the test, although the purported disclosure occurred approximately 15 months prior to the appellant's reassignment, we find that the appellant's allegation is sufficient to meet the nonfrivolous standard at the jurisdictional stage of the proceedings. The Board has found that a period of more than 1 year between a protected disclosure and a personnel action can satisfy the knowledge/timing test. *Redschlag v. Department*

of the Army, [89 M.S.P.R. 589](#), ¶ 87 (2001) (the appellant's disclosures were a contributing factor in her removal when they were made approximately 21 months and then slightly over a year before the agency removed her); *Jones v. Department of the Interior*, [74 M.S.P.R. 666](#), 676 (1997) (the Board found that the appellant's disclosures were a contributing factor in the lower rating the agency gave him in his performance evaluation, which occurred over a year after he made the disclosures); *Smith v. Department of Agriculture*, [64 M.S.P.R. 46](#), 65 (1994) (finding that, where the personnel actions were taken less than 1 year after the protected disclosures, the knowledge/timing test was satisfied); cf. *Jessup v. Department of Homeland Security*, [107 M.S.P.R. 1](#), ¶ 10 (2007) (“Because the appellant's burden at this stage is only to make a nonfrivolous claim, this allegation of knowledge or constructive knowledge is minimally sufficient to meet that low standard.”); but see *Costello v. Merit Systems Protection Board*, [182 F.3d 1372](#), 1377 (Fed. Cir. 1999) (finding that a 2-year gap between the disclosures and the allegedly retaliatory action was too long an interval to justify an inference of cause and effect between the two).

¶13 We therefore find that the appellant has made nonfrivolous allegations that satisfy the knowledge/timing test. Once an appellant has made a nonfrivolous allegation that the knowledge-timing test has been met, he has established the second element necessary to establish Board jurisdiction over his IRA appeal. See *Wood v. Department of Defense*, [100 M.S.P.R. 133](#), ¶ 13 (2005).

¶14 Because the appellant exhausted his administrative remedies before OSC, and in his written submissions nonfrivolously alleged that he engaged in whistleblowing activity by making a protected disclosure and that the disclosure was a contributing factor in the agency's decision to suspend him, we find that he has established Board jurisdiction over his IRA appeal. It was error for the administrative judge to dismiss this appeal for lack of jurisdiction. Given that the appellant has met the jurisdictional requirements with regard to the agency's action of reassigning him to another position, he is entitled to a hearing on the

merits of these claims. *See Drake v. Agency for International Development*, [103 M.S.P.R. 524](#), ¶ 13 (2006).

ORDER

¶15 Accordingly, we REMAND this appeal to the regional office for a hearing and a decision on the merits of the appellant's IRA appeal consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.